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Supreme Court, U. S.
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In the Supreme Court of the United States

OCTOBER TERM, 1973

MICHAEL J. MARCHIO,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

CARL M. WALSH
39 South La Salle Street
Suite 700
Chicago, Illinois 60603
(312) 332-7374

GERALD EISEN
7501 N. Milwaukee
Niles, Illinois 60648
(312) 674-0001
Attorneys for Petitioner

UNITED STATES LAW PRINTING CO., CHICAGO, ILLINOIS 60618 (312) 525-6581

INDEX

PAGE

Opinion Below 1

Jurisdiction 2

Constitutional Provisions Involved 2

Questions Presented 2

Statement of the Case 3

Reasons for Granting the Writ 7

Argument 8

Conclusion 14

Appendices:

Appendix "A"—Opinion of Court of Appeals ..App. 1

Appendix "B"—Order Denying Rehearing ....App. 11

TABLE OF AUTHORITIES CITED

Cases

Bruton v. United States, 391 U.S. 123 .....3, 7, 9, 10

Gonzales-Jasso v. Rogers, D.C.Cir., 264 F.2d 585 12

Gullotta v. United States, 8 Cir., 113 F.2d 683 12

Manning v. United States, 10 Cir., 215 F.2d 945 12

Opper v. United States, 5 Cir., 263 F.2d 304 12

Smith v. Illinois, 390 U.S. 129 11

United States v. Echeles, 7 Cir., 222 F.2d 144 12

PAGE

United States v. Ellicott, 4 Cir., 336 F.2d 868 13

United States v. Heft, 7 Cir., 413 F.2d 1027 10

United States v. Wainer, 7 Cir., 170 F.2d 603 13

Wyatt v. United States, 5 Cir., 263 F.2d 304 12

Constitutional Provisions and Statutes

Amendment V, Constitution of the United States of America 2, 7, 11

Amendment VI, Constitution of the United States of America 2, 7, 11, 12

26 USC 5861(e) 3

28 USC 1254(1) 2

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner, Michael J. Marchio, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit affirming a judgment of conviction and sentence entered by the United States District Court for the Northern District of Illinois, Eastern Division.

OPINION BELOW

The opinion of the Court of Appeals is not yet reported, but is printed in the appendix to this petition (Appendix "A"). The opinion of the Court of Appeals

was entered on August 8, 1973. A timely Petition for Rehearing was denied by order entered September 6, 1973 (Appendix "B").

JURISDICTION

The judgment of the Court of Appeals was entered on August 8, 1973 (Appendix "A"). A timely Petition for Rehearing was denied on September 6, 1973 (Appendix "B").

The jurisdiction of this Court is invoked pursuant to 28 USC 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

Amendment V, Constitution of the United States of America

> "No person shall . . . be deprived of life, liberty, or property, without due process of law; . . ."

Amendment VI, Constitution of the United States of America

> "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him; . . .".

QUESTIONS PRESENTED

1. Can a defendant, who has exercised his rights not to testify, to rely on the rulings of the trial judge, to rely on the failure of the government to prove him guilty beyond a reasonable doubt, and to rely upon his presumption of innocence, and who thus has rested his case prior to the presentation of his co-defendant's case and been told by the trial Court that he can not cross-examine witnesses thereafter, be held to have waived his rights to confront and cross-examine witnesses presented against him?

2. Did not the trial Court's forbidding of the petitioner to cross-examine his co-defendant who presented an entrapment defense fully implicating the petitioner deny the petitioner his Sixth Amendment rights to confront and cross-examine witnesses even though the trial court instructed the jury that said evidence was not admissible against the petitioner in light of *Bruton* v. *United States*, 391 U.S. 123?

3. Is a defendant's extra-judicial, uncorroborated statement standing alone, sufficient evidence on which to convict a defendant in federal criminal felony trial?

4. Was it denial of due process to deny a defendant's motion for severance and at the same time deny him the right to cross examine witnesses and co-defendants who gave crucial testimony against the defendant?

STATEMENT OF THE CASE

Nature of the Case and Its Disposition

Michael J. Marchio was indicted in the Northern District of Illinois, Eastern Division, along with one Allan B. Nardella, in a one-count indictment charging that, ". . . on or about the 24th day of July, 1971, at Joliet, . . .", the defendants ". . . did wilfully and knowingly transfer to Timothy C. Sack, a firearm, that is, a Chinese Communist Type 56 Assault Rifle, 7.62 mm, . . . without obtaining the prior approval of the Secretary of the Treasury or his delegate as required . . . in violation of . . ." 26 U.S.C. 5861(e). (R. 2, A. 1)*

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* Pursuant to Circuit Rule 24 of the United States Court of Appeals for the Seventh Circuit, the defendant-appellant elected not to file a separate appendix; however, certain portions of the record have been reproduced in a short appendix bound to the brief filed in the Court of Appeals, and references thereto shall be "A. ....". All other references shall be to the record on appeal: "R. ....", or to the transcript of proceedings: "Tr. ....".

The defendants pled "not guilty", and the matter was tried to a jury which returned a verdict of guilty on June 28, 1972. On July 19, 1972, after denying the defendants' post-trial motions, the defendant, Michael Marchio, was sentenced to three years' imprisonment on the condition that he be confined six months in a jail type institution, the execution of the remainder of the sentence was suspended, and the defendant placed on probation for a period of thirty months (R. 45, A. 5).

Pleadings

The defendant, Michael J. Marchio, filed certain pretrial motions including: Motion for Discovery (R. 6), Motion to Dismiss (R. 15), Motion for Bill of Particulars (R. 16), Motion to Suppress (R. 17), and a Motion for Severance (R. 18, A. 2). All of these motions were denied (docket entries, p. 3) with the exception that certain discovery and the bill of particulars was allowed (R. 12, p. 3 of docket entries).

The defendant Marchio's Motion to Suppress related to statements and was denied after a hearing (R. 21).

A jury was chosen and trial began before the jury on June 22, 1972 (R. 21).

The Trial

The only evidence admitted by the Court against the defendant Marchio in the government's case was testimony that a month after the date of the offense charged in the indictment, July 24, 1972 (R. 2, A. 1) the defendant Marchio transferred a weapon to a farmer who was at the time of trial facing charges of possession of stolen property (Tr. 237-261), and that Marchio also discussed the possible sale of another weapon with an agent (Tr. 207-236).

All of the evidence concerning the alleged transfer of the weapon involved in the indictment, which was admitted against the co-defendant Nardella, was not admitted against the defendant Marchio, and in fact the jury was instructed that said evidence could not be considered against the defendant Marchio (Tr. 32, 36, 46, 48, 102, 142, 200, 376, 400-401).

In fact, no evidence that there was a sale or transfer of an illegal weapon on July 24, 1972 as charged in the indictment was ever admitted against the defendant Marchio.

The defendant Marchio rested (Tr. 400) prior to any testimony given by the co-defendant Nardella. The trial judge ruled that by resting, the defendant Marchio could no longer participate in the case, could not cross-examine, and that all evidence received thereafter would not apply to him and so instructed the jury (Tr. 400-401).

Subsequently, the co-defendant Nardella testified on his own behalf, asserting the defense of entrapment, and fully implicated the defendant Marchio (Tr. 436-483). The defendant Marchio was not permitted to cross-examine, although the jury was instructed that Nardella's testimony was not to be considered against Marchio (Tr. 400-401).

Although the court instructed the jury that it was to consider each defendant's case only on the evidence admitted against that defendant (Tr. 579), the jury was unable to perform that mental gymnastic and found the defendant Marchio guilty (Tr. 603).

The defendant Marchio was sentenced by the Court to imprisonment for three years on the condition that he serve six months in a jail type institution, with the re-

mainder of the sentence being suspended, and the defendant placed on probation for a period of thirty months (R. 45, A. 5).

The defendant Marchio then appealed to the United States Court of Appeals for the Seventh Circuit which Court affirmed the conviction and sentence in an opinion entered August 8, 1973. A timely Petition for Rehearing was denied on September 6, 1973 and the defendant Marchio now petitions this Court to issue a writ of certiorari to review the opinion of the Court of Appeals.

REASONS FOR GRANTING THE WRIT

The Petitioner argues that the Court of Appeals refused to recognize the violation of his Sixth Amendment right to confrontation in violation of this Court's holding in *Bruton* v. *United States,* 391 U.S. 123.

Further, the Court of Appeals holding that the Petitioner waived his Sixth Amendment Rights when the Petitioner exercised his Fifth Amendment rights to due process, to rely upon the rulings of the trial judge, to not incriminate himself, and to rely upon his presumption of innocence and the burden of the government to go forward and prove the Petitioner guilty beyond a reasonable doubt, was to place one constitutional right above another of equal standing which should not be permitted.

The Court of Appeals holding in finding that the defendant's extra-judicial, uncorroborated statement (which was the sole evidence admitted against the defendant) was sufficient evidence on which to convict is in conflict with decisions of this Court, prior decisions of the Seventh Circuit Court of Appeals, and decisions of other Circuit Courts of Appeals.

In this case it was so tainted by the testimony of his co-defendant, who could not be cross-examined that no jury could follow the Court's instruction to disregard.

ARGUMENT

I.

THE TRIAL COURT ERRED IN DENYING THE PETITIONER MARCHIO'S REPEATED MOTIONS FOR SEVERANCE AND THE COURT OF APPEALS ERRED IN HOLDING THAT THE PETITIONER HAD WAIVED HIS RIGHT TO CONFRONT AND CROSS-EXAMINE WITNESSES.

Before trial, the petitioner Marchio moved for a severance from the defendant Nardella for, among other reasons, that the defendant Marchio:

> ". . . fears that on the trial of this cause, the Government may introduce statements of the co-defendant, inculpatory of him, which although not admissible against the defendant, would be admissible against the declarant and would result in prejudice to the defendant, even though the jury was instructed not to consider the statement against him. Bruton v. United States, 391 U.S. 123 (1968)"

and that

> ". . . the defendant believes his defense will be antagonistic to the co-defendant's defense and therefore prejudicial to him, he further believes that the co-defendant may present an entrapment defense which would be prejudicial to him." (R. 18, A. 2)

The petitioner Marchio's fears as expressed in his motion for severance did come true.

The acts and statements of the defendant Nardella were testified to and admitted against the defendant Nardella (the jury was admonished not to consider the evidence against Marchio). Included in this testimony, was

testimony that Nardella had gotten the gun from a friend, and that he (Nardella) was to receive $50.00 for selling it (Tr. 492). Further, the weapon allegedly illegally transferred was admitted against Nardella (Tr. 47).

Although the evidence was admitted solely against Nardella, and the jury repeatedly so instructed (Tr. 32, 36, 46, 48, 102, 142, 200, 376, 401), the evidence was clearly prejudicial to the petitioner Marchio.

However, the worst violation of the petitioner Marchio's right to a fair trial came after the petitioner Marchio had rested his case following the presentation of a few very credible reputation witnesses (Tr. 400).

The trial judge ruled that the petitioner Marchio could no longer participate in the trial, and that he would have no right of cross-examination (Tr. 399).

Subsequent to this, the co-defendant Nardella testified in his own behalf and testified that he was entrapped (Tr. 436-483). In so testifying, the co-defendant Nardella admitted the offense charged and fully implicated the petitioner Marchio. Although the jury was instructed that this testimony of Nardella was admitted only against Nardella and was not to be considered against Marchio, Marchio was not allowed to cross-examine Nardella, and the jury had the evidence before it.

As was stated in *Bruton* v. *United States,* 391 U.S. 123, 129, 130, 20 L.Ed. 2d 476, 481, 482:

> " 'The fact of the matter is that too often such admonition against misuse is intrinsically ineffective in that the effect of such a nonadmissible declaration cannot be wiped from the brains of the jurors. The admonition therefore becomes a futile collocation of words and fails of its purpose as a legal protection to defendants against whom such a declaration should

> not tell.' 352 U.S. at 247, 1 L.Ed.2d at 288. The dissent went on to say, as quoted in the cited note in Jackson, 'The government should not have the windfall of having the jury be influenced by evidence against a defendant which, as a matter of law, they should not consider but which they cannot put out of their minds.' Id. at 248, 39 L.Ed. at 412. To the same effect, and also cited in the Jackson note, is the statement of Mr. Justice Jackson in his concurring opinion in Krulewitch v. United States, 336 U.S. 440, 453, 93 L.Ed. 790, 799, 69 S Ct 716: 'The naive assumption that prejudicial effects can be overcome by instructions to the jury . . . all practicing lawyers know to be unmitigated fiction . . .' . "

and as the Court went on to say at 391 U.S. 137, 20 L.Ed. 2d 485, 486:

> "Despite the concededly clear instructions to the jury to disregard Evans' inadmissible hearsay evidence inculpating petitioner, in the context of a joint trial we cannot accept limiting instructions as an adequate substitute for petitioner's constitutional right of cross-examination. The effect is the same as if there had been no instruction at all."

This Court has held in *United States* v. *Heft*, 7 Cir., 413 F.2d 1027 (1969), that instructions to disregard inadmissible evidence are insufficient to protect a defendant.

It might be pointed out that the protective instruction given in the charge to the jury herein is quite similar to the one found insufficient in *Bruton* (Tr. 574, 579 — 391 U.S. 125, 20 L.Ed.2d 479, footnote 2).

The only way the petitioner Marchio could have received the fair trial to which he was entitled was for the trial court to grant his motion for severance. The trial court obviously abused its discretion in this cause, and the conviction of the petitioner Marchio should be reversed.

The Court of Appeals however held that the petitioner Marchio waived the right to confront and cross-examine the co-defendant Nardella because he rested his case. The Court makes this holding even though it likewise holds that the petitioner's defense was inconsistent with and antagonistic to the co-defendant Nardella's defense.

It was the trial judge who held that the petitioner could no longer participate in the trial and that he would have no right of cross-examination.

It is thus suggested that to hold that the petitioner's exercise of his Fifth Amendment rights not to testify, to rely on his right to due process of law and therein to rely on the trial judge's evidentiary rulings, the burden of the prosecution to prove him guilty beyond a reasonable doubt and the government's failure to meet that burden, and his presumption of innocence, constituted a waiver of his Sixth Amendment right to confront and cross-examine witnesses against him. In other words the Court of Appeals held that the exercise of one fundamental constitutional right can thereby waive another fundamental constitutional right.

This Court has held that ". . . the right of cross-examination is included in the right of an accused in a criminal case to confront the witnesses against him . . ." and ". . . a denial of cross-examination . . . would be constitutional error of the first magnitude and no amount of showing of want of prejudice would cure it." (*Smith* v. *Illinois,* 390 U.S. 129, 131, 19 L.Ed. 2d 956, 958-959, 88 S.Ct. 748.

It is suggested that this Court must resolve the question of whether an exercise of Fifth Amendment rights can be held to be a waiver of Sixth Amendment rights.

II.

AN EXTRA-JUDICIAL, UNCORROBORATED STATEMENT STANDING ALONE, IS NOT SUFFICIENT EVIDENCE ON WHICH TO CONVICT A DEFENDANT IN A FEDERAL CRIMINAL FELONY CASE AND THE COURT OF APPEALS HOLDING SO IN CONFLICT WITH OPINIONS OF THIS COURT AND OTHER CIRCUIT COURTS OF APPEALS.

In an attempt to say that the denial of Sixth Amendment rights to the petitioner, if error, was harmless error, the Court of Appeals held that an extra-judicial, uncorroborated statement, which was the only direct evidence admitted in evidence against the petitioner, was sufficient evidence to convict the petitioner in this federal criminal felony case.

In making this holding the Seventh Circuit is in conflict with decisions of this Court, (*Opper* v. *United States,* 348 U.S. 84, 99 L.Ed. 101, 75 S. Ct. 158), with other Circuit Courts of Appeals (*Wyatt* v. *United States,* 5 Cir., 263 F.2d 304; *Gonzales-Jasso* v. *Rogers,* D.C. Cir., 264 F.2d 585; *Gulotta* v. *United States,* 8 Cir., 113 F.2d 683; and *Manning* v. *United States,* 10 Cir., 215 F.2d 945; to name a few) and even prior decisions of the Seventh Circuit (See *United States* v. *Echeles,* 7 Cir., 222 F.2d 144).

The only other evidence admitted against the defendant Marchio concerned the testimony of Thomas Weinhold (Tr. 237-261), that in August of 1971, he bought an M-14 machine gun from Marchio. Weinhold further related that he was then facing State charges of having possessed stolen property, and that the M-14 was discovered during the execution of a search warrant in the stolen property case. He had then become a government witness.

The M-14, although admittedly not involved in the offense on trial, was admitted into evidence against Marchio, after evidence offered on the chain of possession after its seizure was received.

The above is the totality of the evidence admitted against Marchio. No direct evidence of a sale or transfer of a firearm on July 24, 1971, was ever admitted against Marchio.

While the evidence of subsequent acts might in this case give rise to some suspicion that Marchio took part in the sale on July 24, 1971, a suspicion is not enough to convict beyond a reasonable doubt.

The Fourth Circuit stated in *United States* v. *Ellicott,* 336 F.2d 868 at 871:

> ". . . this is only a probability which, however great, cannot convict."

It is suggested, as was argued in Point I, the jury was unable to ignore the evidence which was not admitted against Marchio, particularly the testimony of Nardella. But, this Court must consider only the evidence admitted against Marchio in determining the sufficiency of the evidence, and while the Court must view it in the light most favorable for the government ". . . if after resolving every conflict for the prosecution, the proof nowhere establishes guilt to the requisite degree, it is no longer a matter of weighing the evidence, for then no crime has been made out." (*United States* v. *Ellicott,* 336 F.2d 868, 871)

As Judge Minton wrote for the Seventh Circuit Court of Appeals in *United States* v. *Wainer,* 7 Cir., 170 F.2d 603, at 606:

"This evidence merely arouses a suspicion . . . We cannot agree that the defendant should go to prison on suspicion, even though it were a robust suspicion."

CONCLUSION

For the foregoing reasons, the Petitioner respectfully submits that his Petition for Writ of Certiorari should be granted.

Respectfully submitted,

CARL M. WALSH
39 South LaSalle Street, Suite 700
Chicago, Illinois 60603
(312) 332-7374

GERALD EISEN
7501 N. Milwaukee Ave.
Niles, Illinois 60648
(312) 674-0001
Attorneys for Petitioner

October, 1973.

APPENDIX "A"

In the United States Court of Appeals

For the Seventh Circuit

Chicago, Illinois 60604

August 8, 1973

(Argued February 20, 1973)

Before

Hon. Robert A. Sprecher, Circuit Judge
Hon. Robert A. Grant, Senior District Judge*
Hon. Myron A. Gordon, District Judge**

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

No. 72-1752 & 72-1753 vs.

MICHAEL J. MARCHIO and
ALLEN B. NARDELLA,

Defendant-Appellants.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 71 CR 1013
Philip W. Tone, Judge

* Senior District Judge Robert A. Grant of the Northern District of Indiana is sitting by designation.

** District Judge Myron L. Gordon of the Eastern District of Wisconsin is sitting by designation.

ORDER

The appellants, Allen Nardella and Michael Marchio, were indicted for willfully transferring to Timothy C. Sack a machine gun, a Chinese Communist Type 56 Assault Rifle, 7.62 mm, without having obtained the prior approval of the Secretary of the Treasury or his delegate as required by 26 U.S.C. § 5812(a), in violation of 26 U.S.C. § 5861(e). Both were found guilty by a jury and the court below entered judgment in accordance with the jury's verdicts. Marchio was sentenced to six months in prison and thirty months probation. Nardella was placed on probation for a period of 35 months and ordered committed to the custody of the Attorney General for the first thirty days of the sentence.

Appellant Nardella's main argument is that he was entrapped by government agents. He contends that the crime was implanted in his mind by Fred Schwab, a paid informer for agents of the Alcohol, Tobacco and Firearms Division of the United States Department of the Treasury.

The facts surrounding the actual sale transaction are basically undisputed. Timothy Sack, an ATF agent working undercover, had gone to Schwab's home on July 24, 1971, to purchase the automatic rifle from Nardella. After agreeing upon a purchase price of $300.00, the parties went to Nardella's home in Joliet, Illinois, were Nardella produced the rifle and the sale was completed. One disputed fact concerned testimony by Agent Sack that when he dismantled the weapon for inspection, Nardella allegedly explained the absence of two pieces by stating that he didn't keep the two missing pieces in his house so that the "Alcohol, Tax agents couldn't get him."

The original contact with Nardella had been made by Schwab early in July of 1971. Schwab had gone to a

barber shop in Joliet where he engaged in a conversation with the barber about firearms. Schwab mentioned that he would like to purchase some guns and that he had a friend who collected machine guns. The barber told Schwab that he had a customer who might be interested in selling firearms. Schwab left his telephone number with the barber and asked him to give the number to the customer so that the customer might call Schwab.

The testimony concerning the remainder of the preliminary negotiations is conflicting. Schwab testified that a few days later his mother received a telephone call from someone named "Al" and that she took down a return number. He returned the call and talked with Nardella. Schwab testified that after some initial conversation concerning firearms in general, Nardella asked about Schwab's buddy who was interested in purchasing machine guns. Schwab told Nardella that his friend was interested in buying a machine gun and that he could afford to pay for good merchandise. According to Schwab, Nardella responded: "Well, if he's got the money I can load him up."

Nardella, on the other hand, testified that there was no discussion about automatic weapons during the first phone conversation and that Schwab phoned him four or five times before he, not Nardella, first inquired about automatic weapons. He further testified that it was only after Schwab had made numerous other pestering phone calls, as often as two times a night, requesting automatic weapons and contending that they were for a friend, that he agreed to try to find an automatic weapon for Schwab. He told Schwab that he had thought of someone he knew who might have an automatic weapon. The actual sale occurred a few days later.

Nardella also testified that he had not received any money for handling the transaction. However, Schwab

testified on rebuttal that at the time of the transfer Nardella informed them that he was making $50.00 for conducting the sale.

The government correctly argues that generally entrapment is an issue which should be determined by the jury and not by the court, citing *United States* v. *Lauchli,* 371 F.2d 303, 307-308 (7th Cir. 1966) and *United States* v. *Pingleton,* 458 F.2d 722, 724 (7th Cir. 1972). It also notes that the trial court was not obligated to accept the defendant's version of the facts when determining whether entrapment was established as a matter of law. *United States* v. *Brewbaker,* 454 F.2d 1360, 1361 (7th Cir. 1972). Finally, it asserts several factors as demonstrating a lack of entrapment: First, Schwab's testimony that Nardella initiated the telephone negotiations and was first to inquire about Schwab's friend who was interested in automatic weapons; secondly, testimony by both Agent Sack and Schwab that Nardella had received $50.00 for conducting the sale, with the money being payable by defendant Marchio and not the government; and thirdly, testimony again by both Sack and Schwab, concerning Nardella's claim that the automatic rifle was in mint condition.

We find, even without viewing the evidence in light most favorable to the government, that there was ample evidence disputing appellant's claim that he was entrapped. The entrapment issue was properly submitted to the jury. We remind appellant of the rule, cited by the government in its brief, that "[E]ntrapment is not established as a matter of law unless it is patently clear from the undisputed evidence that government agents originated the criminal design and implanted in the mind of an innocent person the disposition to commit the crime." *Pingleton, supra,* 458 F.2d at 724. In the instant case, the evidence is clearly disputed and, thus, does not even begin to approach this standard.

Appellant Nardella also argues that the trial court erred in refusing to permit him to answer a specific question as to his state of mind when he agreed to obtain the machine gun for the informer. In response, the government notes that the trial judge's ruling was not challenged and there was no offer of proof. More importantly, the government contends, and the transcript confirms, that on three other separate occasions defendant was asked why he agreed to obtain the weapon and, in each case, defendant explained that the only reason he agreed to sell the weapon to Agent Sack was because Schwab was pestering him. Any error by the trial court in not permitting Nardella to answer the one question was, at most, harmless error.

With reference to appellant's third argument, suffice to say that we find it totally without merit and, thus, not worthy of any discussion.

Appellant Marchio argues that the trial court erred in denying his repeated motions for severance. He notes that acts and statements of defendant Nardella were testified to and admitted against defendant Nardella, including testimony that Nardella had obtained the gun from a friend and that Nardella was to receive $50.00 for selling it. While conceding that his evidence was admitted solely against Nardella and that the jury was instructed throughout the trial not to consider the evidence against him, Marchio contends that the evidence was nevertheless clearly prejudicial to him.

Marchio alleges, however, that the "worst violation" of his right to a fair trial occurred when, after he had presented "a few very credible reputation witnesses," he rested his case, at which time the trial court ruled that he could no longer participate in the trial and that he would have no right of cross-examination. Upon the jury's

return to the courtroom, the court informed them that evidence to be offered by defendant Nardella was to be considered only as to him.

Marchio argues that the admonitions of the trial judge and the instructions given were insufficient to protect him from prejudice, citing *Bruton* v. *United States,* 391 U.S. 123 (1968) and *United States* v. *Heft,* 413 F.2d 1027 (7th Cir. 1969). He also suggests that his co-defendant's entrapment defense was antagonistic to his defense and, therefore, prejudicial to him. He concludes that he could have received a fair trial only if the trial court had granted his motion for severance.

The government argues that defendant Marchio was not prejudiced by the joint trial but instead benefited by it. In a separate trial, Nardella would have obviously testified, voluntarily or involuntarily via a grant of immunity, that he obtained the weapon from Marchio. It further suggests that Marchio was the "beneficiary of a windfall" in that the court's instructions to the jury to disregard the testimony of Nardella were not required. The government cites the following language of the Second Circuit in *United States* v. *Kahn,* 366 F.2d 259, 263 (2nd Cir. 1966), *cert. denied,* 385 U.S. 948:

> We find no merit in Pacelli's contention that because he rested his case and moved for acquittal at the close of the Government's case, the jury should have been instructed to consider as against him only the evidence adduced on the Government's case. The question of the sufficiency of the Government's case was a legal one; and once the trial court had decided that the Government's case was sufficient to go to the jury, we see no reason why the jury should not also have been free to consider the testimony of Pacelli's codefendants.

The government admits that in the *Kahn* case it is not clear whether Pacelli, like defendant Marchio in the case at bar, was not permitted to cross-examine his testifying codefendant. However, it argues that it makes no difference since Marchio made the choice to rest and before doing so the trial judge repeatedly informed his trial counsel that he was waiving the right to cross-examine all witnesses except those presented in rebuttal to his client's case, i.e., his character witnesses. The government concludes that, unlike *Bruton,* there was an opportunity to cross-examine the declarant but that defendant chose to foreclose the opportunity.

Regarding Marchio's claim that his codefendant's entrapment defense was antagonistic to his defense and thus prejudicial, the government argues that Marchio's presentation of good character evidence is not inconsistent with Nardella's factual concession that he obtained the weapon from Marchio.

We concede that Nardella's entrapment defense was inconsistent and somewhat antagonistic to defendant Marchio's defense, the latter consisting of a not guilty plea and the presentation of character witnesses. However, the record contains other substantial, independent evidence that Marchio had sold the weapon to Agent Sack through Nardella. In the government's case in chief, a second ATF agent, Andrew Vita, testified that on August 17, 1971, approximately three weeks after the incident charged in the indictment, he and informer Schwab met Marchio at his home. Upon entering the home, Vita was asked by Marchio if he was an I.B.I. agent (apparently Illinois Bureau of Investigation). Marchio insisted that Vita hand over his wallet so Marchio could check his identification. Marchio then asked Agent Vita if he was the man interested in buying a gun. Vita replied

that he might be interested depending on what Marchio had to sell. Marchio informed Vita that he had an M-14, E-2 machine gun which he would sell for $450.00. Vita complained that the price was high. Marchio assured him that it was in excellent condition and then asked Vita if he had seen his (Marchio's) AK, the one that Vita's friend had bought. Schwab explained that Marchio was referring to Tim. Record at 214. Agent Vita further testified as follows:

> Mr. Marchio then added that he had given it to a friend to sell for $50.
>
> And then I said, 'That was your weapon?' And he stated that it was. Record at 214-215.

The law regarding severance of defendants is clear. Severance is discretionary with the trial court and its decision will be set aside only upon a showing of a clear abuse of discretion. *United States* v. *Kahn,* 381 F.2d 824, 838 (7th Cir. 1967), *cert. denied,* 389 U.S. 1015; *United States* v. *Tanner,* 471 F.2d 128, 137 (7th Cir. 1972), *cert. denied,* —— U.S. ——. Moreover, as stated in *Tanner,*

> [A] defendant bears the burden of demonstrating that he has been prejudiced by the joinder; that burden is a difficult one. "The defendant must show something more than the fact that 'a separate trial might offer him a better chance of acquittal.' " *Tillman* v. *United States,* 406 F.2d at 935.
> *Ibid.*

In the case at bar, the additional independent evidence described above precludes any contention by Marchio that he was prejudiced by Nardella's testimony that he obtained the weapon from Marchio. Nardella's testimony merely corroborates Marchio's admission that it was his

AK-47 that Agent Tim Sack had purchased from Nardella. While Marchio statements to Agent Vita may not have been as direct as possible, we fail to understand, in view of all the testimony, how the statements could have been interpreted as anything but a definite admission by Marchio that he provided the machine gun which Agent Sack purchased from Nardella.

Nor are we troubled by the fact that Marchio's counsel did not cross-examine defendant Nardella. Marchio insisted on resting his case prior to the presentation of Nardella's defense despite repeated warnings from the trial judge that, if he rested, he would be waiving the right to cross-examine any witnesses defendant Nardella might present, including Nardella himself. We agree that Marchio thereby waived the opportunity to cross-examine defendant Nardella. Marchio indicated in his pre-trial motion for severance that he believed that his codefendant would present an entrapment defense, a defense which would require Nardella to admit the offense charged in the indictment. *United States* v. *Georgiou,* 333 F.2d 440 (7th Cir. 1964), *cert. denied,* 379 U.S. 901; *United States* v. *Johnston,* 426 F.2d 112, 114 (7th Cir. 1970). Under the circumstances we know of no reason why Marchio should not be bound by the clear consequences of his decision to rest, i.e., the loss of the right to cross-examine. In effect, his decision to rest constituted a decision not to cross-examine defendant Nardella if and when he testified. See *United States* v. *Holmes,* 452 F.2d 249, 269 (7th Cir. 1971), *cert. denied,* 405 U.S. 1016 (1972).

Because of Marchio's admission to Agent Vita that he provided the AK-47 which defendant Nardella transferred to Agent Sack, we find without merit Marchio's second argument that there was insufficient evidence to convict him.

Finally, defendant Marchio argues that the trial court erred in admitting evidence of the attempted sale of the M-14, E-2 machine gun to Agent Vita and a sale by Marchio of another M-14 machine gun to Thomas Weinhold, both events having occurred within a few weeks of the charged offense. The evidence was admitted as being probative of Marchio's intent. Noting that the crime charged does not require proof of specific intent, *United States* v. *Freed,* 401 U.S. 601, 607 (1971), defendant contends that the evidence of subsequent similar criminal acts should not have been admitted.

We disagree. First, it is well established that evidence of both prior and subsequent similar criminal acts is admissible to prove intent. *United States* v. *Marine,* 413 F.2d 214, 216-217 (7th Cir. 1969), *cert. denied,* 396 U.S. 1001 (1970). Secondly, defendant overlooks the fact that the jury was instructed that in order to find defendant Marchio guilty they would have to find that he "gave the described firearm to defendant Nardella *with the specific intent* to accomplish that transfer of the described firearm by defendant Nardella . . . ." (Our emphasis.) Record at 582. Of course, defendant Marchio did not object to the instruction and the burden it imposed on the government Also, as noted by the government, defendant's entire defense, to the effect that he was a reputable law abiding citizen who would be unlikely to intentionally violate the law, further stressed the issue of intent. Under these circumstances, the evidence of subsequent similar criminal acts certainly had legitimate probative value which would outweigh any possible prejudicial effect. *United States* v. *Borkenhagen,* 468 F.2d 43, 48 (7th Cir. 1972). We hold that the evidence was properly admitted by the trial court.

The convictions of the defendants are AFFIRMED.

APPENDIX "B"

In the

United States Court of Appeals

For the Seventh Circuit

Chicago, Illinois 60604

September 6, 1973.

Before

Hon. Robert A. Sprecher, Circuit Judge
Hon. Robert A. Grant, Sr. District Judge
Hon. Myron L. Gordon, District Judge

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

No. 72-1752 vs.

MICHAEL J. MARCHIO,

Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
(71 CR 1013)

On consideration of the petition for rehearing and suggestion that it be heard *en banc* filed in the above-entitled cause, no judge in active service having requested a vote thereon, nor any judge voted to grant the suggestion, and a majority of the members of the panel having voted to deny a rehearing,

It Is Ordered that the petition for a rehearing in the above-entitled cause be and the same is hereby denied.

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In the Supreme Court of the United States

OCTOBER TERM, 1973

MICHAEL J. MARCHIO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-598

MICHAEL J. MARCHIO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that he was improperly denied the right to cross-examine a co-defendant, that the evidence was insufficient to sustain his conviction, and that he was improperly denied a severance.

After a jury trial in the United States District Court for the Northern District of Illinois, petitioner and co-defendant Nardella were convicted of selling a machine gun without the prior approval of the Secretary of the Treasury, in violation of 26 U.S.C. 5812(a) and 5861(e). Petitioner was sentenced to imprisonment for six months and to thirty months' probation. The court of appeals affirmed (Pet. App.).

The evidence showed that in July 1971 defendant Nardella, without prior Treasury Department authorization, sold a machine gun to Treasury undercover agent Sack (Pet. App. 2-3). Some three weeks thereafter,

Treasury agent Vita and an informer sought to make a purchase of a machine gun from petitioner. After checking Vita's identification and discussing price, petitioner asked Vita if he had seen the gun which Sack had bought, saying that he, petitioner, had given it to a friend to sell for a commission of fifty dollars (Pet. App. 7-8). Evidence was also admitted that petitioner had sold another machine gun without authority to a third Treasury agent within a few weeks of the charged offense (Pet. App. 10).

All of petitioner's contentions were properly rejected in the thorough opinion of the court below, on which we principally rely. We add only the following:

1. Petitioner insisted on resting his case before the presentation of Nardella's defense, despite the warnings of the court that in so doing he would be waiving the right to cross-examine any witnesses Nardella might present, including Nardella himself (Pet. App. 9). Petitioner fully recognized, even before the trial, the likelihood that Nardella would claim entrapment (Pet. 8). His inability to cross-examine Nardella was thus the result of a considered strategy, foreclosing his present complaint. *United States* v. *Holmes,* 452 F. 2d 249, 269 (C.A. 7), certiorari denied, 405 U.S. 1016.

2. The conversation in which petitioner admitted to agent Vita that, through Nardella, he had sold the machine gun which was the subject of the charge against him, showed that petitioner and Nardella were joined in a criminal venture and rendered admissible against petitioner the independent evidence initially admitted only as to Nardella. Thus, the conviction is not based solely on petitioner's own admissions, as petitioner claims, but on the evidence introduced against Nardella as well. Moreover, the similar transaction at

about the same time with a third agent constituted substantial corroboration of petitioner's admissions. See *Opper* v. *United States,* 348 U.S. 84, 93-94.

3. After petitioner had rested, Nardella took the stand and testified that he had obtained from petitioner the machine gun which was the subject of this charge (Pet. App. 8; Pet. 5). The court instructed the jury to consider this statement solely as to defendant Nardella (Pet. App. 5-6). Petitioner urges that a jury would find it impossible to follow this instruction. However, it is not at all clear that petitioner was entitled to this instruction (see *United States* v. *Kahn,* 366 F. 2d 259, 263 (C.A. 2), certiorari denied, 385 U.S. 948), and such evidence, which in any event was merely corroborative of petitioner's admission, would have likely been available to the government in a separate trial—and with no instruction that it should be disregarded. Consequently, the trial judge, as the court below found, did not abuse his discretion in disallowing petitioner's motion for a severance.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

DECEMBER 1973.